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11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**

13 JANET GARCIA, GLADYS ZEPEDA,
14 MIRIAM ZAMORA, ALI EL-BEY, PETER
15 DIOCSON JR., MARQUIS ASHLEY, JAMES
16 HAUGABROOK, individuals, KTOWN FOR
17 ALL, an unincorporated association,
18 ASSOCIATION FOR RESPONSIBLE and
19 EQUITABLE PUBLIC SPENDING an
unincorporated association,

20 *Plaintiffs,*

21 vs.

22 CITY OF LOS ANGELES, a municipal entity;
23 DOES 1-50,

Defendant(s).

Case No.: 2:19-cv-6182-DSF-PLA
Assigned to Judge Dale S. Fischer

**DEFENDANT CITY OF LOS
ANGELES' OBJECTIONS TO
NEW EVIDENCE SUBMITTED
WITH PLAINTIFFS' REPLY ISO
MOTION FOR PRELIMINARY
INJUNCTION**

Date: April 6, 2020

Time: 1:30 p.m.

Ctrm: 7D

Judge: Hon. Dale S. Fischer

Complaint Filed: July 18, 2019

I. Objection: Plaintiffs’ New Reply Evidence Should Not Be Considered Unless The City Has An Opportunity To Respond.

Defendant City of Los Angeles (“City”) hereby submits this objection to Plaintiffs’ new evidence submitted with its Reply filed on March 23, 2020 in support of its Motion for Preliminary Injunction (Dkt. No. 48, “Reply”).

“Generally, ‘reply briefs are limited in scope to matters either raised by the opposition or unforeseen at the time of the original motion.’” *Townsend v. Monster Bev. Corp.*, 303 F. Supp. 3d 1010, 1027 (C.D. Cal. 2018) (citations omitted). This is because courts recognize that “[n]ew evidence submitted as part of a reply is improper’ because it does not allow the defendant an adequate opportunity to respond.” *Id.* (striking new evidence submitted with reply in support of class certification motion). Consequently, courts may refuse to consider new evidence submitted with a reply, and at a minimum, “should not consider the new evidence without giving the non-movant an opportunity to respond.” *Townsend*, 303 F. Supp. 3d at 1027 (citing *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996)); *Iconix, Inc. v. Tokuda*, 457 F. Supp. 2d 969, 975-76 (N.D. Cal. 2006) (sustaining Defendants’ objection to Plaintiff’s new evidence in reply in support of motion for preliminary injunction, and allowing Defendants to submit supplemental declarations in response).

Not only did Plaintiffs file a Second Amended Complaint (Dkt. No. 43, “SAC”) after the City filed its Opposition to the Motion for Preliminary Injunction (Dkt. No. 42), but Plaintiffs then sought to gain an additional strategic advantage by submitting new evidence with their Reply in support of that Motion. Plaintiffs’ Reply evidence includes three new declarations, which neither directly respond to anything offered in the City’s Opposition, nor present “unforeseen” evidence that could not have been submitted with the Opening Motion.¹ Dkt. Nos. 48-1 (Declaration of S. Myers), 48-2 (Declaration of J.

¹ All three Reply declarations were signed after Plaintiffs sought additional time to file their reply citing “disruptions caused by the emergency precautions” in response to

Gibson), 48-3 (Declaration of A. Flowers); *see also Townsend*, 303 F. Supp. 3d at 1027. Plaintiffs' Reply raises the following new evidence and issues:

New Alleged December 27, 2019 Cleanup: Plaintiffs submitted the Declaration of Albert Flowers. Dkt. No. 48-3; Dkt. No 48-1 at 8:23. Flowers is not a named individual plaintiff, he does not declare that he is member of KFA or that he resides in the Koreatown area. Dkt. No. 48-3 at ¶¶ 1-3. Nonetheless, the Flowers Declaration introduces a new cleanup that allegedly occurred on or around December 27, 2019 involving an alleged removal and discard of a pallet and other miscellaneous statements regarding the City's purported past cleanups. Dkt. No 48 at ¶¶ 6-12. This incident is not alleged in the FAC (or the SAC) and was not raised in the Motion for Preliminary Injunction even though it occurred over two months before the Motion was filed. Nor is it even clear how this incident is relevant to the Motion filed by Plaintiffs Diocson, Ashley, and KFA itself.

COVID-19 Emergency Response: The City's Opposition noted that allowing bulky items to remain in the public right-of-way could create the potential for spread of infectious diseases and noted that this "consideration is particularly important because of the recent public health emergencies declared locally for the coronavirus and past incidents involving a typhus outbreak in Downtown Los Angeles." Dkt. No. 42-6 (Declaration of Howard Wong dated March 9, 2020) at ¶ 53. In Reply, the Myers Declaration addresses the City's emergency COVID-19 motions considered on March 17, 2020 (Dkt. No. 48-1 at ¶¶ 26, Ex. G), and the Reply cites Guidelines from the Centers for Disease Control released on March 22, 2020, both of which occurred after the City filed its Opposition. The Flowers Declaration also addresses the City's efforts to provide emergency shelters and housing for homeless individuals amid the pending COVID-19 pandemic, none of which was raised in the Opening Motion or addressed in the City's Opposition. Dkt. 48-3 at ¶¶ 15-17.

COVID-19 that caused unexpected office closures for Plaintiffs' counsel beginning March 16. Declaration of Gabriel Dermer, Ex. A (3/16/2020 S. Myers email).

1 **Shelter and Housing Issues:** The Myers and Flowers Declarations address issues
 2 regarding shelters and availability of housing that are new issues not raised in the
 3 Opening Motion or addressed in the Opposition. Dkt. No. 48-1 at ¶¶ 7-13, Exs. B-C;
 4 Dkt. No. 48-3 at ¶¶ 15-17. The Flowers Declaration similarly raises new issues regarding
 5 shelter availability and preferences for sheltering in a motel. Dkt. No. 48-3 at ¶¶ 15-17.

6 **Settlement Communications:** The Myers Declaration raises new evidence
 7 improperly disclosing settlement communications involving the City’s good-faith efforts
 8 to resolve disputed issues involving the Motion for Preliminary Injunction. Dkt. No. 48-
 9 1 at ¶¶ 19-25, Exs. E-F. This evidence is not admissible under FRE 408, was improperly
 10 disclosed, and should not be considered.

11 **Discovery:** The Myers Declaration raises new and misleading issues regarding the
 12 status of discovery. Dkt. No. 48-1 at ¶¶ 14-18, Exs. D, E. The City produced thousands
 13 of pages of documents, including regarding reports for alleged incidents and policies.
 14 *See* Dkt. No. 33 at 5 (Order Denying Pltf’s Mot. for Expedited Discovery). The City
 15 produced “new” evidence in response to Plaintiffs’ new unalleged incidents involving
 16 non-plaintiff third parties raised in the Plaintiffs’ Opening Motion.

17 **Past Council Meetings:** Plaintiffs’ Reply submitted the Gibson Declaration
 18 containing hearsay information Gibson obtained by accessing an audio recording on
 19 March 23, 2020 – 7 days after Plaintiffs’ Reply was initially due – of a June 18, 2019 Los
 20 Angeles City Council Committee meeting at which testimony was provided about the
 21 relative percentage, by tons, of property that came from illegal dumping and from
 22 homeless encampments at that time. Dkt. No. 48-2, ¶ 4; Dkt. No. 48 at 11:15. To the
 23 extent either of these pieces of evidence are relevant, Plaintiffs made no effort to explain
 24 why they could not have been obtained and offered in Plaintiffs’ Opening Motion.

25 Plaintiffs’ Reply Declarations improperly introduce new factual evidence or issues
 26 on reply and should not be considered by the Court. *See Townsend*, 303 F. Supp. 3d at
 27 1027. Alternatively, should the Court be inclined to exercise its discretion to review the
 28 late submission of new evidence with Plaintiffs’ Reply, the City should be given an

1 opportunity to respond to it. *See Iconix, Inc. v. Tokuda*, 457 F. Supp. 2d 969, 975-76
 2 (N.D. Cal. 2006) (sustaining Defendants’ objection to Plaintiff’s new evidence in reply in
 3 support of motion for preliminary injunction, and allowing Defendants to submit
 4 supplemental declarations in response); *Townsend*, 303 F. Supp. 3d at 1027 (where new
 5 evidence is offered in reply, a court “should not consider the new evidence without
 6 giving the non-movant an opportunity to respond.”) (citations omitted).

7 The City notes that the circumstances arising from COVID-19 have changed
 8 significantly since Plaintiffs filed their Motion on February 26, 2020 and the City filed its
 9 Opposition on March 9, 2020. If the Court considers Plaintiffs’ new reply evidence, then
 10 the City should be afforded an opportunity to respond, including submission of evidence
 11 regarding the City’s emergency orders, compliance with the “Safer at Home” emergency
 12 orders, the Los Angeles County Department of Public Health and CDC guidelines², and
 13 changes to the City’s operations as a result of COVID-19, all of which is relevant to the
 14 analysis of Plaintiffs’ alleged imminent harm and other elements of Plaintiffs’ Motion.
 15 The City should also be afforded an opportunity to respond to the other new issues,
 16 including new alleged incidents involving non-plaintiff third parties.

17 Dated: March 30, 2020

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21 By: /s/Felix Lebron

22 Attorneys for Defendant
 23 CITY OF LOS ANGELES
 24

25 _____
 26 ² See *Interim Guidance for Responding to Coronavirus Disease 2019 (COVID-19)*
 27 *Among People Experiencing Unsheltered Homelessness* (issued Mar. 22, 2020), available
 28 at <https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-shelters/unsheltered-homelessness.html> (last visited Mar. 30, 2020).